Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

MARY SMYLY,

Petitioner,

versus

IBM CORPORATION, Et Al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QESTIONS PRESENTED FOR REVIEW

1. Do the various and not uniform experimental procedures and practices (shortcuts, truncated processes) being employed by the United States Appellate Court System, the Ninth Circuit in particular, violate the Equal Protection Clause of the United States Constitution?

2. Do those procedures and practices, particulary in the Ninth Circuit, usurp, restrict or otherwise violate the statutory right of appeal?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The Memorandum of the Ninth Circuit is set forth in the Appendix and is unpublished.

A timely Petition for Rehearing was filed, denied and is set forth in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed the District Court on April 27, 1999.

Petitioner sought rehearing arguing that the Court of Appeals had misapprehensions but since it had not seen fit to explain its reasoning the petitioner had to guess at the Court's rationale.

The Ninth Circuit Court of Appeals denied Petitioner's timely petition for rehearing on 28 March 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. & sect. 1254

The Ninth Circuit's memorandum and subsequent order denying rehearing resulted in fundamental unfairness and a violation of the equal protection clause and the right to appeal.

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws."

Mary Smyly respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals of the Ninth Circuit.

STATEMENT OF THE CASE AND ARGUMENT

1. Case in District Court

I, plaintiff Mary Smyly, an African-American woman, was employed by defendant, IBM, for twenty-four years. Beginning in or about 12/89, IBM began engaging in a continuous course of conduct designed to deprive me of benefits of my employment because of my race and age as well as to retaliate against me for raising complaints of discrimination internally to IBM through their open door process and externally by EEOC complaints on my personal issues and as a part of a class action challenging IBM's discriminatory personnel policies (especially the "ranking" process) and practices and, further, for petition-

ing the Department of Labor to investigate and copying newspapers resulting in an article in the San Jose Mercury.

IBM's pattern of discrimination and retaliation included:

1. repeated failure to promote me to managerial positions;

2. repeated failure to offer me equal opportunities or work consistent with my education and experience & to allow me to demonstrate viable and competitive skills to qualify for level and management promotions on merit as well as by the ranking criteria "overall contributions" to IBM;

3. repeated failure to allow me to acquire new, complementary skills necessary to qualify me for level promotions and to demonstrate capability to perform competitively under all aspects of IBM's personnel policy (performance, planning, counseling and evaluation [ppc&e] and practice;

4. repeatedly subjecting me to racial slurs & other harassment;

5. demoting me and the other African-American when others at our position retained their jobs as staff to second line management;

6. creating a hostile, toxic working environment which caused such severe emotional distress and physical illness that I removed myself and sought medical care and was put on medical leave by my physician;

7. terminating my employment on the retaliatory pretext, according to IBM's summary judgment memorandum, that I 1) was insubordinate which led to my being put "on notice" 2) failed and refused to substantiate my need for medical leave 3) made threats of violence against management 4) failed to explain myself after being given a so called "last chance" to do so.

The major events in the course of the proceedings are:

1. My EEOC/DFEH complaint was filed on 3/9/92 with five causes of action: breach of employment agreement, breach of the implied covenant of good faith and fair dealing, race discrimination, age discrimination and retaliation.

2. About 11/13/92 an EEOC charge was filed against IBM (adstar) by William Scott as primary complainant with Dan Harris and me constituting a class action against IBM's discriminatory personnel policies, ppc&e, and practices.

3. In a letter dated 14 December 92 the EEOC offered Mr. Scott a no fault settlement agreement and affirmed that "the July ranking for IBM adstar employees was rescinded due to your charge of discrimination." The proposed agreement specifically states that the respondent (IBM) "agrees not to retaliate against charging party for filing a charge of discrimination with the EEOC. The letter states that if Mr. Scott chose not to settle the "Commission will enter into an agreement on behalf of the class". Scott chose not to settle.

4. Effective 4/21/93 I was terminated from employment after twenty-four years with notice given of termination after the effective date and while on disability leave.

5. On 7/29/93 my former counsel, Kotoske, filed an amended complaint containing claims of race discrimination, age discrimination and retaliation including harassment, denial of opportunities and termination of employment.

6. On 7/9/93 a joint case management conference was held in which the district court set deadlines for discovery and pretrial motions and established dates for the pretrial conference & trial.

7. On 11/19/93 ex-counsel Kotoske moved to compel IBM to produce documents regarding all internal and ad-

ministrative agency complaints of race and age discrimination and a listing of all lawsuits filed for the previous five years. In a 12/20/93 hearing Magistrate Judge Edward Infante ordered that IBM produce the documents only for the period of 1/1/90 thru 4/30193.

8. In 2/94, when Kotoske again absolutely refused to do depositions & to interview my witnesses and demanded that I settle for an amount he had decided on according to his matrix. I instructed him to do so and get on with preparation for trial. On 3/29/94 Kotoske moved to withdraw & on 5/3/94 Judge Whyte granted his motion.

9. IBM filed a motion to compel my medical records, which despite my opposition, on 6/21/94 Magistrate Judge Infante granted.

10. On 19 August 1994 IBM moved for summary judgment.

11. On 9/14/94 Burdick & Sanders aka Prima Legal Services were substituted as my counsel. They asked for an order shortening time for hearing of defendant's motion for summary judgment and trial & to re-open discovery and expert disclosure. On 10/29/94 Judge Whyte denied reopening fact discovery and allowed an emotional distress damages expert.

12. A hearing on IBM's motion for summary judgment was held on 12/9/94. On 1/4/95 Judge Whyte granted IBM's summary judgment motion against the age discrimination and retaliation claims but denied IBM's motion against the race discrimination claim.

13. On 6 Jan 95 the joint pre-trial conference statement was filed.

14. On 1/24/95 the settlement conference began with my being present. Judge Infante ordered that the conference continue and conclude by telephone on 1/25/95 and excluded my participation contrary to his standing order

on who must be present with authority to settle. I had instructed my former attorney, Burdick, that I didn't want to settle on the terms offered by IBM. She did not tell Magistrate Infante.

15. Without my consent or knowledge on 2/7/95 Burdick wrote Judge Whyte and Magistrate Judge Infante asking for stays of deadlines and Infante granted her requests on 2/13/95. Had I known about this letter I might have prevented her from lying to the court because my mother wasn't in Kentucky and wasn't ill and my grandmother didn't expire in 11/94. Burdick is not entirely credible but the district court believed her over me.

16. In mid-February 95 I received a settlement proposal that burdick & sanders insisted that I sign or they would withdraw. I refused because I had not agreed & did not agree to its contents. On 1 march 95 they moved to withdraw.

17. About 21 march 95 IBM filed papers to impose settlement.

18. On 4/10/95 my letter stating my positions on attorney misrepresentations, judicial errors, prima's motion to amend complaint, prima's motion to withdraw, and opposition to IBM's "motion to enforce settlement and for sanctions" was filed.

19. On 12 April 95 I sent a letter to the court, former counsel, and IBM's counsel stating my settlement counteroffer.

20. On 04/12/95 IBM, in its reply to my opposition to enforcement, challenged the credibility of my ex-counsel Burdick.

21. On 4/14/95 during the hearing Burdick & Sanders asked not to be removed as counsel. They affirmed that they did not discuss general releases with me, that there was no discussion of my right or lack thereof to seek employment at IBM, that such an expectation is not a "stan-

dard provision in a contract.

22. At the court's request IBM submitted a supplemental memorandum alleging to show my knowledge of a settlement precondition that I not be allowed (re)employment at IBM and I submitted my response to it.

23. On 06 Sept. 95 Judge Whyte imposed IBM's settlement on me which contained misstatement and provisions not agreed upon.

24. About 10/26/95 IBM moved for order adjudging me in contempt for not obeying a court order to sign the court imposed settlement.

25. On 9/26/95 I submitted a letter to the district court requesting reconsideration on the issues of 1) former counsel's withdrawal, 2) settlement imposed by court order, 3) the involvement of IBM counsel Madison and IBM legal agent, Liberty Mutual, in wrongful denial of my workers compensation claim though IBM had the required information in its possession by court order, and 4) my reporting the workers compensation violation issues to the Santa Clara district attorney's office so I would not be falsely accused of insurance fraud as well as assault. IBM denied any wrongdoing in writing. As result of the letters submitted to the court on 11/15/95, the court issued an "order re further proceedings" "advising plaintiff, defendant and their respective counsel that it intends to act further in this case only on a properly noticed motion by a party."

26. About 8 Dec 95 I filed a motion for leave to file a motion for reconsideration of the settlement enforcement.

27. On 21 march 97 IBM filed a motion to dismiss. On 22 August 97 the court denied IBM's motion subject to my signing the court's rewritten version of what the court imposed.

28. On 9/15/97 I filed my objections and my motion for recusal and review. On 10/2/97 IBM filed a motion to dis-

miss. On 12/12/97 Judge Whyte held a hearing, denied my objections and "all other motions or requests plaintiff labeled as a request for review, objections, or in any other fashion", denied my motion to recuse and granted IBM's motion to dismiss because I refused to agree to the settlement he imposed on me.

2. Case in Appellate Court and Argument

Violation of Statutory Right of Appeal & Violation of Equal Protection Clause

Although the right of appeal is so far statutorily guaranteed, the Ninth Circuit has illegally denied it by subjecting me to a series of procedures and rulings which inhibit full access to the courts.

Consider first, that in the Federal Rules of Appellate Procedure for the Ninth Circuit it states that staff attorneys "assign a numerical point designation to the case reflecting the relative amount of judge time that likely will be spent in the matter. Cases suffering from clear jurisdictional defects are processed through a motions panel as soon as the defects are detected." (Note that no criterion for the assignment of this "numerical point designation" is explained). The Rules further say that law clerks "prepare memorandum for oral presentation to three judge panels, principally in cases where no oral argument is calendered," and "motion attorneys present all motions to three judge panels or the Appellate Commissioner"

However, Justice Thomas of the Ninth Circuit asserts in his statement to the Commission on Structural Alternatives for the Federal Court of Appeals that "The Pro Se Unit of the staff attorneys' office effectively manages and concludes thousands of pro se appeals each year." He also asserts that the Pro Se Unit is an administrative unit.

Administrative units have no judicial authority. They are not authorized by law to conclude cases; that is an improper delegation of authority. The staff has blocked

access to the judges/court as well as making decisions for which they are not authorized.

Secondly, consider that in Circuits other than the Ninth, as stated in the Commission testimony oral argument is always granted but perhaps only to attorneys who request it. That suggests that pro se litigants are being subjected to a second class standard of justice. Chief Judge Hatchett of the Eleventh Circuit is in favor of granting oral argument even to pro se litigants which by her question seemed to surprise Judge Rymer of the Ninth Circuit. In the Lopez-Lukis case in the Eleventh Circuit the Judges state that "It is important for litigants to know what a court's ruling is, that their cases were fairly considered. In addition, it is desirable generally for litigants to understand the rationale for the court's decision. Oral argument and summary affirmance serve that purpose. The Rule 36-1 affirmance in this case occurred after oral argument, in which the parties were given an opportunity to present their arguments and to hear from the court. We thought the in-court discussion among the judges and the lawyers would make the panel's rationale apparent to the litigants ..." Apparently these kinds of considerations for litigants is not available in the Ninth Circuit and if they are perhaps only to privileged, aka represented, parties.

There seems to be a profound disdain for certain classes of litigants as is shown by analysis of the Commisison testimony and by the research of scholars like Professors Reynolds and Richman. Professor Richman states "Today, the "routine" appeals of the system's least wealthy and powerful litigants get no argument, no conference, no written, published precedential opinion and little personal attention of the Article III judges. Instead, they receive bureaucratic treatment of the hands of the central staff." Some of the classes of cases research has identified as being accorded second class justice are "social security liti-

gation, civil rights cases, pro se appeals, and prisoner petitions". The case at hand falls into a couple of those categories. Professor Richman maintains that "The basis guarantee of justice to all in equal measure suffers under any regime that allocates justice differently according to the wealth and sophistication of the litigants." Supreme Court Justice Breyer submitted to the Commission that "The federal judge is meant to be independent and conscientious, devoting the time and attention that a particular litigant's individual legal problem requires for proper decision, irrespective of the litigant's wealth, position, or power." Given the current "crisis" and the debates over solutions and the experiments across the circuits what is being done to assure full, fair, and equal justice for the citizenry "in the meantime"?

THE SMYLY V IBM APPEAL

1) APPELLANT FILED OPENING BRIEF USING THE PRO SE FORMAT PROVIDED BY THE NINTH CIRCUIT AND ACCORDING TO THE RULES AND REGULATIONS OF THE CIRCUIT.

2) APPELLEE, IBM. FILES ITS ANSWERING BRIEF.

3) APPELLANT, SMYLY, FILES TIMELY REPLY BRIEF.

4) THE COURT SENDS NOTICE THAT IT IS CONSIDERING SUBMISSION OF THE CASE TO AN NON-ARGUMENT PANEL; THE COURT SEND THE CASE TO AN ARGUMENT PANEL AFTER APPELLANT PETITIONS FOR ORAL ARGUMENT

5) ORAL ARGUMENT IS DOCKETED AND APPELLANT TRAVELS FROM KENTUCKY TO CALIFORNIA TO FULLY ARGUE HER CASE EXPECTING THE INTERACTION WITH THE COURT IN ASSESSING THE ERRORS OF THE DISTRICT COURT.

6) THE COURT ISSUES AN ORDER DENYING ORAL ARGUMENT STATING PURSUANT TO CIRCUIT RULE 34-4 THE CASE WOULD BE SUBMITTED ON THE BRIEFS AS THE FACTS AND LEGAL ARGUMENTS ARE ADEQUATELY PRESENTED IN THE BRIEFS AND THE RECORD;

APPELLANT HAS NO GROUND ON WHICH TO PETITION FOR RECONSIDERATION BECAUSE RULE 27-10 REQUIRES THE PETITIONER TO "STATE WITH PARTICULARITY THE POINTS OF LAW OR FACT WHICH, ... THE COURT HAS OVERLOOKED OR MISUNDERSTOOD". SINCE THE COURT HAS NOT YET MADE ANY STATEMENT WHATSOEVER THE PETITIONER HAS NOTHING TO CHALLENGE AND ESPECIALLY NOT WITHIN THE DIRECTIVES OF RULE 27-10.

7) A MEMORANDUM WAS ISSUED DENYING APPEAL WITHOUT GIVING A RATIONALE. THE SUMMARY OF THE CASE AS STATED IN THE COURT'S MEMORANDUM LEAVES OUT SIGNIFICANT FACTS AND CIRCUMSTANCES WHICH SHOULD HAVE BEEN CONSIDERED AND HAD IT BEEN DONE WOULD HAVE ALTERED THE OUTCOME OF THE APPEAL. THERE ARE NO REFERENCES WHATEVER TO APPELLANT'S CASELAW OR TO THE CALIFORNIA LAW WHICH MAKES THE DISTRICT COURT'S ORDER IMPOSING SETTLEMENT ILLEGAL.

AGAIN, PETITIONER HAS NO BASIS WITHIN THE DIRECTIVE OF FRAP 40, PETITION FOR PANEL REHEARING, TO SUCCESSFULLY PETITION FOR REHEARING.

When citing the standard of review, the Ninth Circuit references *Maynard v. City of San Jose,* 37 F.3d 1396, 1401 (9th Circuit 1994) but fails to notice that this case is

amazing similar to the one at hand and was decided in the opposite fashion. That the Appellate could reference a case so similar and rule differently and without explanation has to case suspicion on the Ninth Circuit's procedures and practices.

8) AN ORDER DENYING APPELLANT'S PETITION FOR REHEARING WAS ISSUED WITHOUT COMMENT OR ANY INDICATION OF THE REASON FOR THE DENIAL.

Federal Rule of Appellate Procedure 40, Petition for Panel Rehearing, states that the "petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition". Since the "memorandum" affirming the lower court made no reference to any points of law and completely ignored fact and circumstances which significantly alter the limited summary stated in the memorandum there was nothing petitioner could do but restate her original points of her brief.

As Judge Carolyn Dineen King of the Fifth Circuit of Appeals stated "... litigants would more likely be persuaded that we have at least paid some attention to their case if we give succinct, particularized reasons for the decision. The petition for rehearing cannot serve its function of identifying error by the panel if no reasons are given and the litigant feels compelled simply to regurgitate his or her brief in order to be sure that the panel understood his or her point" and "giving reasons, however briefly, provides a basis for accountability of the panel and the system generally."

By not ordering conferencing, by denying oral argument, by not stating any points of law (absolutely no mention was made of the caselaw or the California law that made the District Court's ruling illegal that I presented) and by ignoring all the critical facts in the record and by

not issuing an opinion, the Ninth Circuit Appellate Court usurped my statutory right of appeal.

Justice Stevens has observed that unpublished decisions are "secret law" that result in "decision making without the discipline and accountability that the preparation of [published] opinions requires." *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985).

> " '(If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aides reckonability." ' (*Id.* at 937 n.6 (Stevens, J., dissenting) (quoting K. Llewellyn, The Common Law Tradition 26 (1960), as quoted in W. Reynolds & W. Richman, *The Non-Precedential PrecedentóLimited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1204 (1978))

The sequence of events in *Smyly v. IBM* including not "publishing" an opinion even to the parties constitutes "secret law".

> "Public availability of judicial opinions helps to hold judges accountable to society for the decisions they reach. Public scrutiny helps to maintain the integrity of the judicial system and assure that individual cases are fairly decided.
>
> "When a judge's reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair. Therefore the public availability of [] opinions promotes judicial accountability, which may also enhance public confidence in the legal system." (K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 567 (1997)
>
> "The quality of appellate review that particular classes of litigants receive (per Reynolds & Richman) should itself be a sufficiently odious violation of the Equal

> Protection Clause to require Supreme Court review". That appellate courts may continue to wrongly decide low profile cases for years because their errors are not brought to public attention" ought also to warrant Supreme Court review". The studies of Professors Reynolds and Richman on the issues of fairness for certain classes of litigants plus the evidence of my particular case should be more than sufficient for the granting of a Writ of Certiorari.

The Court should therefore grant the petition for a writ of certiorari and rule that the Appellate Court has denied Petitioner equal protection of the law and full and fair right of appeal. The Ninth Circuit should be reversed to allow a full and fair hearing.

CONCLUSION

That the Appellate system is in 'crisis' due to overload is not at issue as scholars and judges agree. But the experiments the different circuits have implemented have neither resulted in uniformity nor evenhanded administration of justice for our citizens.

Judge Hug says that the Ninth Circuit is functioning well but that must be administratively, i.e. case termination rates. But that wellness is not apparent when the Appellate Courts are looked at from the viewpoint of making sure that the District Courts are right and right for sound reasoning.

The petition for a writ of certiorari should be granted.

DATED: 25 August 1999.

Respectfully,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15075
D.C. No. CV-93-20149-RMW

MARY C. SMYLY, - - - - *Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

ORDER—Filed May 28, 1999

Before: GOODWIN and TROTT, Circuit Judges, and KING,* District Judge.

The Petition for Rehearing is DENIED.

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*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15075
D.C. No. CV-93-20149-RMW

MARY C. SMYLY, - - - - *Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 13, 1999**
San Francisco, California

MEMORANDUM—Filed April 13, 1999**

Before: GOODWIN, TROTT, and KING,*** District Judge)

Mary C. Smyly appeals pro se the district court's order dismissing her complaint for failure to comply with court orders and to diligently prosecute the consummation of the settlement. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

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* This disposition is not appropriate for publication and may not be citetto or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

A district court may dismiss an action with prejudice "[for failure of the plaintiff to prosecute or to comply with any order of court." Fed. R. Civ. P.41(b). We review a dismissal under Rule 41(b) for abuse of discretion. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996). A district court's decision regarding the enforceability of a settlement agreement is reviewed for abuse of discretion. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994). "Reversal is appropriate only if the court based its decision on an error of law or clearly erroneous findings of fact." *Id.* (quotation omitted).

A careful review of the record supports the District Court's dismissal. The parties, through counsel, negotiated a settlement on January 24, 1995 with a United States Magistrate Judge acting as settlement judge. The terms were placed on the record. The Magistrate Judge confirmed that Smyly participated at virtually every stage of the negotiations and, more importantly, had expressly agreed to the terms of the settlement at the settlement conference. After a lengthy evidentiary hearing, including testimony from counsel and Smyly, the District Judge found that a definitive settlement had been reached. On September 6, 1995, he ordered the settlement enforced. Substantial evidence in the record supports the District Judge's findings. The District Court did not abuse its discretion in enforcing the settlement agreement. See *Maynard*, 37 F.3d at 1401.

After Smyly refused to consummate the settlement by signing settlement documents, IBM sought to hold Smyly in contempt. Over a year later, on September 18, 1996, the Court refused to hold Smyly in contempt but again confirmed that a binding settlement had been reached. The Court ordered the parties to prepare and execute a release and dismissal in accordance with the Court's instructions. In its September 18, 1996 Order, the Court twice specifically warned Smyly that failure to comply with its Order would result in dismissal of her case.

On January 8, 1997, the Court granted partial reconsideration and allowed worker's compensation claims to be excluded from the release. The Court again ordered compliance with the September 18, 1996 Order, and instructed Smyly to advise IBM regarding payment or, absent instructions, allowed IBM to satisfy its obligation by depositing fluids with the Court.

Smyly again refused to consummate the settlement, conceivably because of a dispute about the release language. IBM filed a Motion to Dismiss. After extensive briefing, on August 22, 1997 the Court denied IBM's Motion, subject to the parties' compliance with its Order regarding the settlement. The Court prepared its own language for a release, which conformed to the settlement as the Court had enforced. The Court gave Smyly until September 12, 1997 to sign the release. The Court again notified Smyly that if she failed to comply with the Court's Order, IBM could renew its application for dismissal. Smyly failed to comply.

Accordingly, IBM filed another Motion to Dismiss. On December 12, 1997 — nearly three years after the settlement had been put on the record — the District Court dismissed the action for Smyly's failure to comply with court orders and failure to diligently prosecute consummation of the settlement. At the hearing, the Court explained:

> I think we've been over many of these things many times before, and the Court did make an Order enforcing the settlement.
>
> The Court has tried to bend over backwards on behalf of both sides to try and avoid any communication problems between the parties following the consummation of the settlement.... But the Court went through and tried to make a release that was totally consistent with what it found to be a settlement.
>
> Ms. Smyly has chosen, for her reasons, not to go forward with it, and I think this case has come to an end[.]

Under these circumstances, we cannot say the District Court abused its discretion in dismissing the action under Rule 41(b). The District Court allowed Smyly several opportunities to present her views regarding the settlement. The record supports the finding that there was a binding settlement. The District Court displayed considerable patience, especially after Smyly's counsel withdrew and she proceeded pro se.[1] The Court gave her ample notice that failure to comply with court orders would result in dismissal, and gave Smyly several chances to obey its rulings. The District Court acted well within its discretion in dismissing the action. *See Johns*, 114 F.3d at 876; *Al-Torki*, 78 F.3d at 1384.[2]

AFFIRMED.

---

[1] We therefore reject Smyly's argument that Judge Whyte should have recused himself. Adverse rulings are not grounds for recusal. *See Liteky v. United States*. 510 U.S. *540, 556* (1994).

[2] The District Court's prior summary judgment order was rendered moot by the settlement and is not appealable. *See Al-Torki*, 78 F.3d at 1386 (holding that dismissal under Rule 41 (b) for failure to prosecute renders prior interlocutory appeals not appealable).

Supreme Court, U.S.
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SEP 28 1999
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No. 99-367

In The

Supreme Court of the United States

MARY SMYLY,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

On Petition For A Writ Of *Certiorari* From The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals denied petitioner equal protection of the laws under the United States Constitution by affirming the district court's dismissal of petitioner's civil action against IBM based on the parties' briefs and the record and without holding oral argument.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The following companies are subsidiaries of respondent International Business Machines Corporation ("IBM"):

Ancor Communications, Inc.
Dassault Systemes S.A.
Image Business Systems Corp.
I/Net, Inc.
Object Design, Inc.
Seer Technologies, Inc.
Silicon Valley Group, Inc.
Uniquest, Inc.

IBM does not have any parent corporations.

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II. Petitioner's Appeal Was Properly Decided Because The District Court Dismissed Her Case Only After Conducting A Full Evidentiary Hearing On The Circumstances Surrounding The Settlement And Twice Ordering Petitioner To Execute The Agreement, Which Orders Petitioner Blatantly Ignored 7

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CONSTITUTIONAL PROVISION, STATUTE AND RULE

Fed. R. App. P. 34 ..... 5, 6, 7

28 U.S.C. § 1254(1) 1

U.S. Const. amend. XIV, § 1 1

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondent International Business Machines Corporation ("IBM") respectfully requests that this Court deny petitioner Mary Smyly's petition for a writ of *certiorari*, which seeks review of the Ninth Circuit's decision affirming the district court's dismissal of petitioner's civil action against IBM.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, App. 1-App. 5), which affirmed the district court's order of dismissal, was ordered not published. The order of the district court dismissing petitioner's case (App., *infra*, App. 6-App. 8) is also unpublished.

JURISDICTION

The court of appeals affirmed the district court's dismissal on April 27, 1999. Petitioner's request for rehearing was denied on May 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner in her petition invokes section 1 of the Fourteenth Amendment to the United States Constitution, which provides that "no State shall . . . deny to any

person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's employment discrimination case was dismissed by the district court (Honorable Ronald M. Whyte) on December 12, 1997, after that court found that petitioner had entered into an enforceable settlement agreement with IBM on January 24, 1995, but which petitioner refused for nearly three years to consummate in disregard of two court orders.

Erroneous in numerous non-material respects, petitioner's factual recitation in her petition contains at least one material misrepresentation that necessitates correction here. Petitioner asserts that although she was present at the inception of the settlement conference on January 24, 1995, U.S. Magistrate Judge Edward E. Infante (who facilitated the negotiations) "ordered that the conference continue and conclude by telephone [the next day] and excluded [petitioner's] participation. . . . " Petition for Writ of *Certiorari* ("Petition"), at 5. This statement is contradicted by the record. When the settlement conference ended at 9:30 p.m. on January 24, negotiations as to the terms of the settlement had concluded – all that was left to do was confirm the settlement on the record. (ER 00554.) Due to the late hour and the unavailability of a court reporter, the parties agreed to place the settlement on the record the next day. At no time did Magistrate Judge Infante exclude petitioner from participating in that proceeding.

Magistrate Judge Infante evidenced these facts at the telephone conference on January 25, 1995. In that call, Magistrate Judge Infante noted for the record "as the settlement judge, that the plaintiff expressly agreed to the settlement at the settlement conference yesterday." (ER 00558.) Petitioner's contention that she was not present for the entire settlement conference, and that it continued in her absence on January 25, is belied by Magistrate Judge Infante's statement for the record on January 25 that petitioner had agreed to the settlement the night before. (*Id.*)

Furthermore, during the evidentiary hearing on IBM's motion to enforce the settlement agreement, petitioner herself acknowledged on the record that she had agreed to the settlement:

> MS. BURDICK: Mary, the last question I have for you, are there any circumstances under which you would accept the terms of the settlement that were arrived at on January 24, 1995?
>
> MS. SMYLY: The night of the hearing?
>
> MS. BURDICK: The night of the settlement conference.
>
> MS. SMYLY: I have always maintained that I felt manipulated into it, pressured into it. But if the court decided that I had to adhere to *what I agreed to, because I did agree to it*, and if the court said I had to do that knowing the circumstances, then, yes, I have to agree to it. I mean there is nothing else for me to do.

(ER 00729-00730) (emphasis supplied).

REASONS PETITION SHOULD BE DENIED

I. Petitioner's Challenge To A Routine And Universal Appellate Procedure Does Not Constitute Sufficient Grounds For Granting A Writ Of *Certiorari*; Indeed, This Court Has Already Held That The U.S. Constitution Does Not Require Oral Argument In All Cases.

This Court's Rule 10 sets forth the grounds for granting *certiorari*: (1) a conflict exists amongst certain courts on an important legal issue; (2) a decision by a court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; or (3) a decision by a state court or federal court of appeals on an important question of federal law has not been, but should be, settled by this Court.

The petition here fails to raise any of these grounds. Indeed, the petition consists of nothing more than an attack on the routine procedures of the federal appellate court system – procedures that have been authorized by this Court and universally followed by the federal courts of appeals.

Petitioner asks the Court to grant her petition based primarily on the fact that the Ninth Circuit denied her request for oral argument and instead decided her appeal on the basis of the parties' briefs and the record.[1] Specifically, petitioner asserts that the Ninth Circuit's refusal

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[1] The Ninth Circuit first notified the parties that the court was considering deciding the case without oral argument, but gave them the opportunity to submit a statement setting forth the reasons why oral argument should be granted. *See* App.,

to hear oral argument violates the Equal Protection Clause of the United States Constitution as well as her "statutory right of appeal." *See* Petition, at *i*.[2]

The Ninth Circuit's refusal to hear oral argument, however, is specifically sanctioned by Federal Rule of Appellate Procedure ("FRAP") 34. FRAP 34(a)(2) states:

> (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and

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infra, App. 8. Petitioner did so (*see id.*, App. 9), and the case was thereafter set for oral argument with the proviso that the three-judge panel assigned to hear the argument would retain discretion to submit the case on the briefs without oral argument. *See id.*, App. 10. On March 31, 1999 – two full weeks before oral argument was to be heard – the court informed the parties that the panel had decided that oral argument was not necessary. *See id.*, App. 11.

[2] Petitioner also challenges the court of appeals' decision not to publish its opinion affirming the ruling of the district court in the court's official reports. In particular, petitioner contends that the opinion was not "published" to the parties. *See* Petition, at 13. Petitioner is, of course, mistaken. Petitioner, like IBM, received a full copy of the court of appeals' opinion, which clearly set forth the reasons for its decision. *See* App., *infra*, App. 1 to App. 5. The fact that the opinion was unpublished does not mean that petitioner was left unaware of the reasons behind the court's decision; nor does it mean that the court was practicing "secret law." *See* Petition, at 13.

> record, and the decisional process would not be significantly aided by oral argument.

Here, the panel expressly found that oral argument was unnecessary under FRAP 34(a)(2). *See* Petition, App. at 2a n.** Further, petitioner acknowledges that this was the basis for the Ninth Circuit's decision not to hold oral argument. *See* Petition, at 11.

This Court has long ago held that the Constitution does not require oral argument in all cases. *See Federal Communications Comm'n* v. *WJR*, 337 U.S. 265, 276 (1949); *Price* v. *Johnston*, 334 U.S. 266, 286 (1948). In approving FRAP 34, this Court acknowledged the self-evident fact that, practically speaking, the courts of appeals cannot hear oral argument in every case placed on their dockets.

Every circuit in the United States adheres to FRAP 34(a)(2) and routinely denies oral argument when one of the factors delineated in the rule is satisfied.[3] Thus, petitioner's assertion (at page *i* of her petition) that the Ninth Circuit's practices are "not uniform" and "experimental" is woefully uninformed. Indeed, the Ninth Circuit's decision to rule on petitioner's appeal without oral argument is so commonplace that an electronic search of court of appeals decisions turned up no fewer than 505 cases – *in 1999 alone* – in which a circuit court panel decided an

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[3] *See* 1st Cir. L.R. 34.1(a), 1st Cir. I.O.P. VII; 2d Cir. L.R. 34(d); 3d Cir. L.R. 34.1(a), 3d Cir. I.O.P. 2.4; 4th Cir. L.R. 34(a), 4th Cir. I.O.P. 34.2; 5th Cir. L.R. 34.1, 34.2, 5th Cir. I.O.P. (screening); 6th Cir. L.R. 34(j), 6th Cir. I.O.P. 34(e); 7th Cir. L.R. 34; 8th Cir. L.R. 34A; 9th Cir. L.R. 34; 10th Cir. L.R. 34.1; 11th Cir. L.R. 34-3; D.C. Cir. L.R. 34(j); Fed. Cir. L.R. 34.

appeal without oral argument.[4] Clearly, 505 examples in one year does not reflect an "experimental" procedure meriting review by this Court.

The fact that petitioner appears before this Court *pro se* does not change the analysis.[5] There is no *pro se* exception to FRAP 34(a)(2).

Petitioner's argument that by deciding her appeal without oral argument, the Ninth Circuit denied her equal protection and/or her "statutory right of appeal" is nonsensical. The Ninth Circuit was merely following the rules adhered to by every federal appellate court in the nation. Because the court's decision to do so does not present a question appropriate for this Court to review, petitioner's petition should be denied.

II. Petitioner's Appeal Was Properly Decided Because The District Court Dismissed Her Case Only After Conducting A Full Evidentiary Hearing On The Circumstances Surrounding The Settlement And Twice Ordering Petitioner To Execute The Agreement, Which Orders Petitioner Blatantly Ignored.

On January 24, 1995, petitioner agreed – in front of a United States Magistrate Judge, her attorneys of record, and IBM's attorneys – to settle her lawsuit against IBM.

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[4] The search was conducted on September 17, 1999, using the Westlaw database.

[5] It bears noting that petitioner retained and then discharged no fewer than three sets of attorneys before deciding to proceed with the case *pro se*.

After petitioner refused to execute the settlement agreement, the district court held an evidentiary hearing regarding IBM's motion to enforce the agreement. During questioning by her attorney at the hearing, petitioner admitted that she had agreed to the settlement on January 24. *See* text at 3, *supra* ("I have always maintained that I felt manipulated into it, pressured into it. But if the court decided that I had to adhere to *what I agreed to, because I did agree to it*, and if the court said I had to do that knowing the circumstances, then, yes, I have to agree to it. I mean there is nothing else for me to do.") (ER 00729-00730, emphasis supplied.)

Although the district court and, subsequently, the Ninth Circuit fully considered all of the evidence introduced by the parties,[6] in reality petitioner's admission at the evidentiary hearing ends the analysis. In light of the fact that petitioner has never once introduced a shred of evidence explaining how – or by whom – she was "manipulated" or "coerced" into accepting the settlement, her admission that she did indeed agree to it is dispositive.

Moreover, and as set forth above, even the most cursory glance at the procedural history of this case shows the undeniably wide latitude afforded to petitioner by the district court over the six-and-a-half years since

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[6] While petitioner's "evidence" consisted of her recitation of "facts" that no one else could substantiate, IBM's showing included statements by a Magistrate Judge, petitioner's own attorneys – and even petitioner herself – that petitioner had, in fact, agreed to the settlement.

petitioner first filed her complaint before ultimately dismissing her action when she refused to consummate the settlement.[7] The Ninth Circuit properly found no error in this decision.

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[7] The record shows that Judge Whyte went to extraordinary lengths to ensure that petitioner was heard fully on every aspect of the settlement. For example, on one occasion, after a hearing regarding petitioner's refusal to comply with the court's order to execute the settlement agreement, Judge Whyte allowed petitioner to submit a letter detailing the comments that petitioner alleged she had not had time to assert at the hearing. Further, the district court did not dismiss petitioner's case until she had refused – on two occasions – to comply with the court's order to consummate the settlement or face dismissal of her action. Clearly, there was no denial by the district court of petitioner's right to be heard.

CONCLUSION

Petitioner presents no grounds for the Court to question a procedure that is uniformly followed by the courts of appeals and that is fully constitutional. Moreover, petitioner's appeal was fully considered by the Ninth Circuit before it affirmed the district court's dismissal of her case. Accordingly, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JEFFREY D. WOHL
KIMBERLY A. PETERSON
ORRICK, HERRINGTON &
SUTCLIFFE LLP

Dated: September 28, 1999.

JEFFREY D. WOHL
Attorneys for Respondent
International Business Machines
Corporation

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY C. SMYLY, Plaintiff-Appellant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee.	No. 98-15075 D.C. No. CV-93-20149-RMW MEMORANDUM* (Filed Apr. 27, 1999)

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 13, 1999**
San Francisco, California

Before: GOODWIN, TROTT, and KING,*** District Judge.

Mary C. Smyly appeals pro se the district court's order dismissing her complaint for failure to comply with court orders and to diligently prosecute the consummation of the settlement. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

A district court may dismiss an action with prejudice "[f]or failure of the plaintiff to prosecute or to comply with any order of court." Fed.R.Civ.P. 41(b). We review a dismissal under Rule 41(b) for abuse of discretion. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996). A district court's decision regarding the enforceability of a settlement agreement is reviewed for abuse of discretion. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994). "Reversal is appropriate only if the court based its decision on an error of law or clearly erroneous findings of fact." *Id.* (quotation omitted).

A careful review of the record supports the District Court's dismissal. The parties, through counsel, negotiated a settlement on January 24, 1995 with a United States Magistrate Judge acting as settlement judge. The terms were placed on the record. The Magistrate Judge confirmed that Smyly participated at virtually every stage of the negotiations and, more importantly, had expressly agreed to the terms of the settlement at the settlement conference. After a lengthy evidentiary hearing, including testimony from counsel and Smyly, the District Judge found that a definitive settlement had been reached. On September 6, 1995, he ordered the settlement enforced. Substantial evidence in the record supports the District Judge's findings. The District Court did not abuse its discretion in enforcing the settlement agreement. *See Maynard*, 37 F.3d at 1401.

After Smyly refused to consummate the settlement by signing settlement documents, IBM sought to hold Smyly in contempt. Over a year later, on September 18, 1996, the Court refused to hold Smyly in contempt but

again confirmed that a binding settlement had been reached. The Court ordered the parties to prepare and execute a release and dismissal in accordance with the Court's instructions. In its September 18, 1996 Order, the Court twice specifically warned Smyly that failure to comply with its Order would result in dismissal of her case.

On January 8, 1997, the Court granted partial reconsideration and allowed worker's compensation claims to be excluded from the release. The Court again ordered compliance with the September 18, 1996 Order, and instructed Smyly to advise IBM regarding payment or, absent instructions, allowed IBM to satisfy its obligation by depositing funds with the Court.

Smyly again refused to consummate the settlement, conceivably because of a dispute about the release language. IBM filed a Motion to Dismiss. After extensive briefing, on August 22, 1997 the Court denied IBM's Motion, subject to the parties' compliance with its Order regarding the settlement. The Court prepared its own language for a release, which conformed to the settlement as the Court had enforced. The Court gave Smyly until September 12, 1997 to sign the release. The Court again notified Smyly that if she failed to comply with the Court's Order, IBM could renew its application for dismissal. Smyly failed to comply.

Accordingly, IBM filed another Motion to Dismiss. On December 12, 1997 – nearly three years after the settlement had been put on the record – the District Court dismissed the action for Smyly's failure to comply with

court orders and failure to diligently prosecute consummation of the settlement. At the hearing, the Court explained:

> I think we've been over many of these things many times before, and the Court did make an Order enforcing the settlement.
>
> The Court has tried to bend over backwards on behalf of both sides to try and avoid any communication problems between the parties following the consummation of the settlement. . . . But the Court went through and tried to make a release that was totally consistent with what it found to be a settlement.
>
> Ms. Smyly has chosen, for her reasons, not to go forward with it, and I think this case has come to an end[.]

Under these circumstances, we cannot say the District Court abused its discretion in dismissing the action under Rule 41(b). The District Court allowed Smyly several opportunities to present her views regarding the settlement. The record supports the finding that there was a binding settlement. The District Court displayed considerable patience, especially after Smyly's counsel withdrew and she proceeded pro se.[1] The Court gave her ample notice that failure to comply with court orders would result in dismissal, and gave Smyly several chances to obey its rulings. The District Court acted well

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[1] We therefore reject Smyly's argument that Judge Whyte should have recused himself. Adverse rulings are not grounds for recusal. *See Liteky v. United States*, 510 U.S. 540, 556 (1994).

within its discretion in dismissing the action. *See Johns*, 114 F.3d at 876; *Al-Torki*, 78 F.3d at 1384.[2]

AFFIRMED.

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[2] The District Court's prior summary judgment order was rendered moot by the settlement and is not appealable. *See Al-Torki*, 78 F.3d at 1386 (holding that dismissal under Rule 41(b) for failure to prosecute renders prior interlocutory appeals not appealable).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Mary C. Smyly, Plaintiff, v. IBM Corporation, and Does 1 through 20, inclusive, Defendants.	NO. C-93-20149 RMW(EAI) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS MOTION TO RECUSE (Filed Dec. 15, 1997)

The motion of defendant IBM to dismiss and the motion of plaintiff Smyly to recuse came on for hearing on December 12, 1997. The court has read the moving and responding papers and heard the argument of both IBM's counsel and Ms. Smyly. The court hereby grants defendant IBM's motion to dismiss on the grounds that plaintiff has failed to comply with the court's orders and diligently prosecute the consummation of the settlement. Plaintiff's motion to recuse (and all other motions or requests by plaintiff labeled as a request for review, objections or in any other fashion) is denied. Plaintiff's motion to recuse fails to set forth facts which present grounds for recusal.

Nothing in this order, of course, affects any rights plaintiff may believe she has to appeal the judgment of dismissal to the Court of Appeals.

Dated: 12/12/97

/s/ Ronald M. Whyte
Ronald M. Whyte
District Judge

Copy of Order mailed on DEC 15 1997 to:

Mary Smyly
1412 N. English Station Road
Louisville, Kentucky 40223

Jeffrey D. Wohl
Orrick, Herrington & Sutcliffe LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

October 14, 1998

CA No. 98-15075 Smyly v. Int'l Business

To All Parties:

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See 9th Cir. R. 34-4. Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of a party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Arden Wong
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____ SMYLY _____ Appellant/Petitioner	CASE NO. _____ 98-15075 _____
vs	
_ IBM CORPORATION _ Appellee/Respondent	

APPELLANT/PLAINTIFF'S STATEMENT
IN FAVOR OF ORAL ARGUMENT

Appellant/plaintiff believes the Court will be greatly and significantly aided by oral argument in assessing the issues involved in this case.

This case has had a long (almost five years) and complex history in the lower Court and the issues are neither simple nor straightforward.

Because of the number of procedural and substantive issues, appellant/plaintiff reasonably believes that oral argument should be heard to allow the most clear and complete presentation of the issues that is possible.

/s/ Mary Smyly 23 Oct 1998
Appellant/Plaintiff
(Attorney Pro Se)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-1939
December 10, 1998

In re: 98-15075 Mary Smyly v. IBM, Corp.

Recently you received notice that the United States Court of Appeals was considering submitting your case without oral argument. That notice reflected the tentative assignment of your case to a panel of the Court assigned to decide cases without oral argument.

Upon further consideration, the Court has decided that your case should be reassigned to an oral argument panel. Although in most instances a reassigned case will receive oral argument, the panel of judges to whom the case will be assigned has discretion to order the case submitted on the briefs without oral argument. When the time and place for argument before or submission to an argument panel has been determined by the Court, our office will notify you by mail.

Very truly yours,

CATHY A. CATTERSON
Clerk of Court

/s/ Tim Hom
Tim Hom
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY C. SMYLY Plaintiff-Appellant, v. INTERNATIONAL BUSINESS MACHINES INCORPORATED Defendant-Appellee.	No. 98-15075 D.Ct. No. C-93-20149-RMW ORDER (Filed March 31, 1999)

Pursuant to Circuit Rule 34-4, the panel has unanimously determined that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument. This case shall be submitted on the briefs and record, without oral argument, on Tuesday, April 13, 1999 in San Francisco.

FOR THE COURT

CATHY CATTERSON
CLERK OF THE COURT

BY: /s/ Estela Urrutia
Deputy Clerk

No: 99-367

(3)

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1999

Mary Smyly, Petitioner,
vs.
IBM Corporation, et al,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

Mary Smyly
1412 N. English Station Road
Louisville, Kentucky 40223
502 / 245-4236

BY PERMISSION OF THE CLERK OF THE COURT I AM SUBMITTING THIS DOCUMENT IN NON-STANDARD FORMAT. I WAS INSTRUCTED BY THE CLERK TO ASSURE THAT THIS DOCMENT IN THE REQUIRED FORMAT WILL BE SUPPLIED TO THE COURT. THAT SUBMISSION BY ALL INDICATIONS WILL BE MADE SUBSEQUENT TO MY HOSPITALIZATION.

3PP

FAX COVER SHEET

12609 Shelbyville Road
Louisville, KY 40243
Ph: 502-254-5300
Fax: 502-254-5340

To: KATHY TYCZ

Fax #: 202-479-3021

From: MARY SMILEY

Phone #: 502/245-4236

Fax #: N/A

- High Speed Digital Copies
- Color copies
- Binding
- Laminating
- Typesetting
- Engineering Copies
- Posters and Banners

Comments Being submitted from your authorization — Thank, Ford

Number of pages including cover page 8

MAY IT PLEASE THE COURT.

I am compelled to remind the court that as stated in Eldridge v Block, 832 F.2d 1132 (9th Cir. 1987, section 6), this court has decreed that a pro se litigant's "inartful pleading" is to be liberally construed especially in civil rights cases. With that in mind I apologize for any violation of protocol and to thank the court for its consideration.

QUESTIONS PRESENTED - DISPUTED

IBM has misstated the issues I brought before this court. Clearly my issues are not just the denial of oral argument. My issues are directed at entire processes, which by admission in the White Commission's report to Congress on the appellate court, put the quality of justice at risk.

The issues I raised are questions addressing the constitutionality of the appellate processes which are practiced among the circuits without congressional approval for different rules for different classes of litigants which is the definition of discrimination. One major issue is the violation of due process rights by the appellate court's failure to state reasons addressing the facts and the law. By issuing a non-specific "substantial evidence" ruling the appellate court denied me equal opportunity to seek reconsideration according to the court's own rules and with respect to other appellants who are given fully reasoned opinions which my right of appeal and the constitution have ensured. The appellate court rubber stamped the district court and the record shows that the district court erred and erred frequently.

Any compromise to the court's essential function of serving the citizenry is unacceptable and is not in accordance with our constitutional rights.

STATMENT OF THE CASE - DISPUTED

The document containing the alleged settlement agreement is entitled "Settlement Conference by Telephone" (Appendix A). The content of this document shows that the conference ended when a written record was created. The language is simple and unambiguous and there has been no question of the procedural accuracy of that designation. If I am wrong then the court produced documents are wrong and then there are serious problems